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Nos. 88-931 and 88-938

In the Supreme Court of the United States

OCTOBER TERM, 1988

LAWRENCE H. CRANDON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

THE BOEING COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
JOHN R. BOLTON
Assistant Attorney General
MICHAEL F. HERTZ
DOUGLAS LETTER
JOAN E. HARTMAN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether severance payments made by petitioner Boeing Company to five of its employees—which were made solely because the employees were to assume positions with the Department of Defense, and which were calculated to make up the difference between the departing employees' salaries and benefits with the federal government and their higher salaries and benefits with Boeing—violated the prohibition in 18 U.S.C. 209 against the supplementation of the salaries of federal employees.

2. Whether the court of appeals correctly required the recipients of those payments to forfeit them to the United States in this civil action.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a)[1] is reported at 845 F.2d 476. The opinion of the district court (Pet. App. 16a-29a) is reported at 653 F. Supp. 1381.

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 88-938.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-15a) was entered on May 5, 1988, and timely petitions for rehearing were denied on September 7, 1988 (Pet. App. 30a-31a). The petition for a writ of certiorari in No. 88-931 (Individuals' Pet.) was filed on December 5, 1988, and the petition for a writ of certiorari in No. 88-938 (Boeing Pet.) was filed on December 6, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 209(a) of Title 18 of the United States Code provides in pertinent part:

> Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government * * * from any source other than the Government of the United States * * *; or
>
> Whoever * * * pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection—
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> Shall be fined not more than $5,000 or imprisoned not more than one year, or both.

STATEMENT

In 1981 and 1982, petitioner Boeing Company, a large defense contractor, paid a total of $485,000 to five of its employees, petitioners Melvyn Paisley, T.K. Jones, Herbert Reynolds, Harold Kitson, and Lawrence Crandon, who were about to accept high-level positions in the Department of Defense. Pet. App. 2a, 4a. The court of

appeals held that these payments violated 18 U.S.C. 209(a), which bars the supplementation of the salary paid for services as a federal employee, and that the recipients therefore must forfeit those payments to the United States.

1. The amounts Boeing paid to the five individual petitioners were called "severance payments," but they were neither rewards based on the recipients' past services to Boeing nor hardship payments to provide a financial cushion for employees between jobs. Rather, the payments were made only because the individual petitioners were to assume positions with the Department of Defense, and the amount of the payments was tied directly to their future government employment.[2] In fact, the evidence showed that during the preceding 20 years, Boeing had made only 21 similar payments, and in every case, the recipient left Boeing to accept a high-level position with the United States Government—typically in the Department of Defense or the National Aeronautics and Space Administration (NASA) and typically involving research and development or long-range defense planning. The payments were made to these recipients, including the five individual petitioners in this case, in order to encourage them to accept federal employment. No such payments were offered to Boeing employees who retired, left Boeing for other nonfederal employment, or accepted

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[2] The amount of Boeing's payments to and the government positions accepted by the individual petitioners were: Paisley ($183,000), Assistant Secretary of the Navy for Research, Engineering and Systems; Jones ($132,000), Under Secretary of Defense for Strategic and Theater Nuclear Forces; Reynolds ($80,000), Deputy Director of Space and Intelligence Policy; Kitson ($50,000), Deputy Assistant Secretary of the Navy for Command, Communications and Control Intelligence; and Crandon ($40,000), computer scientist for NATO Air Command and Control Systems Team.

lower-level government positions or positions at agencies other than those of special interest to Boeing. Pet. App. 4a, 8a, 17a-18a.[3]

The principal factor used to calculate the amount of the payment to each of the five individual petitioners was the anticipated difference between his salary and benefits with Boeing and the lower salary and benefits he would receive during the period of between three and four years that he expected to work for the Department of Defense. Each employee-petitioner calculated that differential over the projected three- or four-year period, which corresponded to the time remaining in the first Administration of President Reagan, and each submitted his calculation to Boeing.[4] Boeing's personnel officials then calculated the same

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[3] See C.A. App. 61-65, 441, 547-549, 595, 638-639, 645-647, 682-683, 691, 777. Of the 20 Boeing employees who received such payments between 1962 to 1982 (petitioner Jones left twice and received a payment each time), 15 went to the Department of Defense and two went to NASA. The average payment made to those individuals was approximately $40,000. The average payment to the remaining three individuals was $6500. Those three accepted positions as (1) as a staff member of a congressional aeronautical and space science committee, (2) Assistant Secretary of Commerce for Science and Technology, and (3) Staff Leader of Aeronautical Research at the National Aeronautics and Space Council, Office of the President. At least 15 other individuals left Boeing for jobs with the federal government during the same period without receiving a severance payment. Only two of those individuals accepted positions with the Department of Defense, neither in a research-and-development position. C.A. App. 61-64.

[4] Some of the individuals also submitted a calculation of the value of vested benefits that they would lose upon leaving Boeing. However, each individual ultimately received separate checks from Boeing for the amounts to which all employees are entitled when they resign or retire, including vested salary and benefits earned and accrued (Pet. App. 4a). The government did not challenge those payments because they were made pursuant to a policy of general applicability and because they were based on past services the recipient actually performed

differential and used the resulting figure as the principal component of the proposed payment, which also included an amount to cover expenses of moving to Washington, D.C., and an estimated cost-of-living differential between Seattle and Washington, D.C. See C.A. App. 9-60. The payments as so calculated were then approved, virtually without change, by the Chairman of the Board of Boeing, T.A. Wilson. Wilson testified that he knew the payments were designed to alleviate the financial "hardship" that Boeing employees might experience in leaving to work for the federal government, including the lower salary and the moving expenses, and that one of the considerations in calculating the amount of the payment was the difference between the person's Boeing salary and his federal salary. Pet. App. 4a, 8a; see C.A. App. 645-646.[3]

2. The United States filed this civil action against petitioner Boeing and the five individual petitioners, seeking

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for Boeing, not on his future employment with the federal government.

[3] The individual petitioners contend (Individuals' Pet. 5 n.3) that Wilson "determined the actual amounts to be paid on the basis of what he decided was the proper reflection of the employees' years of contribution to Boeing." Wilson testified, however, that he was not acquainted with several of the recipients (C.A. App. 644), and he therefore would not have been in a position to make an independent assessment of their past contributions to the company. Nor was Wilson given any information concerning the employees' past services. Wilson made no changes in the amounts proposed to him, except to order that petitioner Paisley's payment be reduced by a "present value" calculation, reflecting the current value to Paisley of four years' worth of supplements paid in advance. C.A. App. 19, 529-531, 536, 649, 661. Thereafter, Wilson approved a payment of $3,000 in addition to the $180,000 previously approved for Paisley (who became a government consultant pending the Senate's advice and consent to his appointment), and the additional amount was explicitly "for salary differential (difference between Gov't consulting and Boe[ing] salary)" (Gov. Exh. 111, No. 697/100165).

disgorgement of the payments by the individual petitioners and damages from petitioner Boeing in the amount of the payments. The United States contended that the payments constituted unlawful supplementations of the recipients' federal salaries, in violation of 18 U.S.C. 209(a).

The district court granted judgment in favor of petitioners (Pet. App. 16a-29a). The court first held that Section 209(a) does not prohibit any supplementation of a federal salary that is paid prior to the formal onset of the recipient's government employment (*id.* at 25a, 26a). The court further held that the payments in this case were in any event not unlawful under 18 U.S.C. 209(a), because, as the court saw it, they were intended to "sever the relationship" between Boeing and its employees, not to supplement the latters' government salaries or to compensate them for their government services (*id.* at 20a, 26a). The court accepted the government's proof that the challenged payments were made by Boeing to induce the recipients to accept federal employment and to bridge the disparity between private and public salaries; that the payments were made solely to those leaving for federal employment; and that the payments were intended by petitioner Boeing to be the equivalent of the "paid leave" it had granted to employees who work for a state or local government (*id.* at 17a-18a, 26a). But the court concluded that "the formula for calculation of severance pay cannot make the payment something other than severance pay" (*id.* at 26a).

The district court also expressed the view that damages could not be recovered by the United States under Section 209(a) without a showing of actual corruption on the part of Boeing or the individual petitioners, which it had not shown in this case (Pet. App. 28a). Finally, in the court's view, such payments could not be recovered unless they were "secret," and it believed that the individual petitioners had made sufficient disclosures concerning the

amount of the payments to certain employees of the Department of Defense (*id.* at 27a).[6]

4. The court of appeals reversed, holding that the payments violated Section 209(a) (Pet. App. 1a-15a). The court first held, contrary to the district court's view, that payments made prior to the onset of federal service are within the reach of Section 209(a) (Pet. App. 6a-7a). The court noted that prior to 1962, the predecessor statute applied to "[w]hoever, being a Government official or employee," receives a supplementation of salary (see 18 U.S.C. 1914 (1958)), but that the limiting phrase "being a Government official or employee" was deleted when Congress enacted the present 18 U.S.C. 209 as part of the comprehensive revision of the conflict-of-interest laws in 1962. See Act of Oct. 23, 1962, Pub. L. No. 87-849, § 1(a), 76 Stat. 1125. The court also found this interpretation supported by the policies underlying Section 209 and the conflict-of-interest laws generally, which establish "rigid rules of conduct" to prevent activities that "arouse suspicions of malfeasance and corruption" and which thereby ensure that the government retains the faith of the people that is critical to "the very fabric of a democratic society" (*id.* at 6a-7a, quoting *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, 562 (1961)). The court ex-

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[6] The district court held that the government's claims against Boeing based on four of the five payments were barred by the three-year statute of limitations in 28 U.S.C. 2415(b) for actions founded upon a tort (Pet. App. 29a). The claims against the individual petitioners are governed by the six-year statute of limitations in 28 U.S.C. 2415(a) for actions founded upon a contract, and therefore were not time-barred. The court of appeals affirmed the district court's rulings on the statute of limitations issue, but made clear that the government could not recover from both Boeing and the individual petitioner in the case of the one payment for which recovery from Boeing was not time-barred (Pet. App. 10a-12a).

plained that "[l]arge severance payments by defense contractors to those going to work at high levels in the Defense Department certainly 'arouse suspicions,' and those suspicions are not reduced by making the payments just before government service begins" (Pet. App. 7a).

The court of appeals did not accept the government's contention that Section 209(a) sets forth an objective standard of conduct that does not include an element of intent, since Section 209(a) prohibits payments that are made "as compensation for" the recipient's federal services (Pet. App. 7a). However, the court found that the record established the requisite compensatory intent, and that the district court's contrary finding was clearly erroneous. The court relied on four factors. First, the individual recipients and Boeing personnel officials "calculated salary, benefits and cost-of-living differences over the expected term of government employment," and the Chairman of Boeing, who decided the ultimate amount, "received a recommendation and was aware of the factors used to reach that figure" (*id.* at 8a). Second, "Boeing's stated purpose in making the payments was to encourage public service by lessening the financial penalties involved in accepting government employment" (*ibid.*). Third, Boeing's parallel policy of providing paid leave for its employees who work for a state or local government "suggests that payments to federal employees were designed to do the same thing without technically violating § 209" (*ibid.*). Fourth, the fact that only 21 such payments had been made over the preceding 25 years, and those were made only to persons entering high-level government positions, "similarly suggests an intent to supplement the federal salaries of a limited number of employees" (*ibid.*).

The court of appeals rejected petitioners' contention that the government was not injured, and that the individual petitioners therefore were entitled to retain the

payments, because they did not result in an actual conflict of interest. The court explained that this argument "ignores the preventive nature of the conflict of interest laws," under which "the appearance of conflicts rather than actual conflicts or corruption is all that is necessary" (Pet. App. 8a-9a). In this case, the court concluded, "[t]he appearance of large payments by a defense contractor to key Defense Department employees is enough; there is no need to show an actual conflict, much less actual corruption" (*id.* at 9a).

Finally, the court rejected petitioners' reliance on a common law doctrine that only "secret" profits give rise to a conflict of interest. The court reasoned that this suit is based not on the common law, but on the statutory rule prescribed by Section 209, which is not limited to secret payments (Pet. App. 9a). Moreover, even under the common law, effective disclosure must be "formal, complete, and directed to the proper parties" (*ibid.*). Here the recipients' financial reporting forms revealed only their total income from Boeing, without separately identifying severance payments, and the court therefore found that any disclosures were "not sufficiently complete to insulate the payments from the conflict of interest laws" (*ibid.*).[7]

ARGUMENT

The payments made by petitioner Boeing and received by the individual petitioners in this case were classic violations of 18 U.S.C. 209(a): they were made solely because the individual petitioners planned to assume positions with the Department of Defense; they were intended to encour-

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[7] Judge Hall dissented from the panel's holding that the payments were made and received with compensatory intent (Pet. App. 13a-15a). Petitioners' petitions for rehearing with suggestions for rehearing en banc were denied by a 6-5 vote (*id.* at 30a-31a).

age the recipients to accept those possitions; and they were calculated to supplement the recipients' federal salaries by making up the difference between their government pay and their higher pay with Boeing (as well as to defray other expenses incurred in accepting the government positions). The decision of the court of appeals, which simply requires disgorgement of those illegal payments, is correct and does not conflict with any decision of this Court or of another court of appeals. Moreover, the decision below is consistent with advice given by the Department of Justice to other agencies and prospective appointees for fifteen years. The petitions for a writ of certiorari therefore should be denied.

1. The court of appeals correctly held that the United States has a civil cause of action to recover payments made in violation of the standards of conduct established by a criminal conflict-of-interest statute. Such a statute is "evidence of the precise nature of th[e] fiduciary duty" owed to the United States by its agents (*United States* v. *Kenealy*, 646 F.2d 699, 703 (1st Cir.), cert. denied, 454 U.S. 941 (1981)), and breach of the statutory standards "will establish, as a matter of law, [the agent's] breach of fiduciary duty owed the United States." *United States* v. *Podell*, 436 F. Supp. 1039, 1042 (S.D.N.Y. 1977), aff'd, 572 F.2d 31 (2d Cir. 1978). See *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520 (1961).

Section 209(a), like its predecessor, 18 U.S.C. 1914 (1958), is "framed as an absolute prohibition against double compensation for Government services." Staff of Subcomm. No. 5 of House Comm. on the Judiciary, 85th Cong., 2d Sess., *Federal Conflict of Interest Legislation* 44 (Comm Print 1958). At its core, this prohibition applies to payments that have either of two characteristics. First, the statute bars payments, however denominated, that are specifically intended to induce acceptance of

federal employment. As former Assistant Attorney General Scalia explained in an opinion addressing the precise question of the application of Section 209 to severance payments, such payments may "not [be] used to induce or influence Government employment." Op. Off. Legal Counsel at 3 (Oct. 21, 1974); see also 5 Op. Off. Legal Counsel 150, 151 (1981); Op. Off. Legal Counsel at 6 (May 10, 1976).[8] Second, "the appointee's former employer cannot under this section make up the difference between his former salary and his government salary." Ass'n of the Bar of the City of New York, *Conflict of Interest and Federal Service* 65 (1960). Thus, a payment "based directly on the difference between [a private] salary and [an employee's] governmental salary * * * would be a clear violation of 209(a)." Op. Off. Legal Counsel 3 (Aug. 7, 1974);[9] see also R. Perkins, *The New Federal Conflict-of-Interest Law*, 76 Harv. L. Rev. 1113, 1137-1138 (1963) ("The most important application of the outside compensation prohibition is the typical case where a corporate executive is asked to go to Washington, and his corporation offers to pay all or part of the difference between his present salary and his future government salary.").[10]

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[8] Copies of the opinions of the Office of Legal Counsel cited in the text were included in an addendum to the government's brief in the court of appeals. The opinions of the Office of Legal Counsel have traditionally been an important source of guidance on matters of government ethics.

[9] Accord, Op. Off. Legal Counsel 4 (Dec. 17, 1976) ("Payment of the salary differential" between a government salary "and a higher corporate salary" would "clearly constitute a 'supplementation of salary' prohibited by 18 U.S.C. § 209(a).")

[10] Roswell Perkins, the author of the article cited in the text, was the chairman of the special committee of the Association of the Bar of the City of New York that conducted a comprehensive study of the federal conflict-of-interest laws, which in turn formed an important part of the basis for Congress's revision of those laws in 1962. See

The payments at issue in this case had both of these prohibited features. The district court found that the payments were made to encourage Boeing employees to accept government positions (Pet. App. 17a); the court of appeals agreed, noting that "Boeing's stated purpose in making the payments was to encourage public service by lessening the financial penalties involved in accepting government employment" (*id.* at 8a); and petitioners concede in this Court that the purpose of the payments was "to encourage public service by decreasing the financial penalties incurred by employees who left the employ of Boeing to enter public service" (Boeing Pet. 5; see also Individuals' Pet. 15-16). Similarly, it is undisputed that the payments in this case were calculated in large part on the basis of the difference between the recipient's Boeing salary and his lower salary with the federal government. See Pet. App. 4a, 8a, 18a, 26a. These conclusions of course are reinforced by the fact that Boeing did not have a policy of general applicability providing for severance payments to employees who left Boeing to take any of a broad range of jobs; rather, the uncontradicted evidence showed that Boeing consistently made such payments only to persons who were to assume high-level positions with the federal government—a factor that has uniformly been regarded as a ground for finding a payment barred by Section 209. 5 Op. Off. Legal Counsel 150, 151 (1981); Op. Off. Legal Counsel at 3, 5 (Sept. 15, 1977); Op. Off. Legal Counsel at 6, 7-8 (May 10, 1976); Op. Off. Legal Counsel at 3, 4-5 (Oct. 21, 1974); Perkins, 76 Harv. L. Rev. at 1139.

Conflict of Interest and Federal Service, at xii. Mr. Perkins was recognized by Congress as an important contributor to the legislative process (see H.R. Rep. No. 748, 87th Cong., 1st Sess. 8 (1961)), and the article quoted in the text is often cited as a contemporaneous and authoritative explanation of the 1962 revision.

The other principal components of the payments in this case—for moving expenses and a cost-of-living differential—were also clearly barred by Section 209(a). In fact, Congress amended 18 U.S.C. 209 in 1979 to permit a private employer to pay relocation expenses in only one narrow situation: where the recipient is a participant in a special interchange or fellowship program established by statute or Executive Order that offers appointments for a period of not to exceed one year. See 18 U.S.C. 209(e), as amended by the Act of Dec. 29, 1979, Pub. L. No. 96-174, 93 Stat. 1288. The legislative history shows that this amendment was enacted in response to an opinion of the Office of Legal Counsel that payment of moving expenses is generally prohibited by Section 209(a). See H.R. Rep. No. 674, 96th Cong., 1st Sess. 2, 5, 6, 8 (1979); 2 Op. Off. Legal Counsel 267 (1978). Although Congress carved out a special exception, it left undisturbed the general prohibition against reimbursement of moving expenses. Moreover, the legislative history makes clear that the special exception does not overcome the bar in Section 209(a) against a private employer's payment of a federal employee's "personal living expenses" (*id.* at 2-3). It necessarily follows in this case that Boeing was barred by Section 209(a) from paying a portion of the individual petitioners' personal living expenses—namely, the portion representing the cost-of-living differential. In sum, all of the principal components of the severance payments at issue in this case were clearly barred by 18 U.S.C. 209(a).

2. Notwithstanding the broad purposes of the prohibition against supplementation of a federal salary, petitioners contend (Individuals' Pet. 10-17) that any payments made prior to the time the recipient actually commences his federal employment are wholly outside the scope of Section 209(a). The court of appeals correctly rejected that contention (Pet. App. 6a-7a).

Section 209(a) provides that "[w]hoever receives any * * * supplementation of salary, as compensation for his services as an officer or employee of the executive branch," commits a criminal offense. This language requires only that the services to which the payments are tied be performed by the recipient in his capacity as a federal officer or employee. This prerequisite was amply established here. Section 209(a) is not further limited to situations in which the recipient is actually a federal officer or employee at the time the payments are made. Nor should such a limitation be read into the statutory text absent compelling indications of congressional intent, because the result would be to facilitate circumvention of the statutory bar. In any event, the legislative history establishes that Section 209(a) should not be given the self-defeating construction petitioners urge.

Before 1962, the predecessor to Section 209 (18 U.S.C. 1914 (1958)) and the predecessor to 18 U.S.C. 203 (18 U.S.C. 281 (1958)) stated that those prohibitions applied only to persons who accepted payments while "being a Government official or employee" or "being * * * [an] officer or employee of the United States." However, this limiting language was dropped from both provisions in 1962, thereby eliminating a loophole that failed to prohibit "pre-Government-employment agreements to receive compensation." *Federal Conflict of Interest Legislation* at 8, 25 (referring to Section 203); H.R. Rep. No. 748, 87th Cong., 1st Sess. 20 (1961); *Hearings Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 87th Cong., 1st Sess. 37 (1961). The change was "designed to provide that violation shall turn on the recipient's status at the time of * * * rendition of services, rather than on his status at the time of agreement for or receipt of compensation." *Federal Conflict of Interest Legislation* at 51; see *id.* at 22, 25 (predecessor to Section 203); *id.* at 62 (new Sec-

tion 209 is to be applied "coextensively with" new Section 203). Thus, as the leading commentator on the 1962 revision observed, by virtue of this change, "[t]he time of receipt of the outside compensation is clearly irrelevant under [18 U.S.C. 209(a)], if the compensation is for the government services." Perkins, 76 Harv. L. Rev. at 1137.

Petitioners contend (Individuals' Pet. 13-14), citing *United States* v. *Muntain,* 610 F.2d 964 (D.C. Cir. 1979), and *United States* v. *Raborn,* 575 F.2d 688 (9th Cir. 1978), that "[o]ther circuits have recognized that Congress intended Section 209 to be limited to incumbent federal officials." Neither decision stands for that proposition. In *Muntain,* the court held that Section 209 was inapplicable not because the defendant was not a government employee at the time that he accepted the payments, but because the payments were for services that the recipient performed while he was on annual leave and that had no relation to his official duties. 610 F.2d at 969-960. The fact that the employee was on annual leave when he accepted the payments was cited by the court of appeals not, as petitioners state (Individuals' Pet. 14), in order to establish that the recipient must have "employee status" at the time a payment is received, but to establish that the defendant was not being paid twice for services to the government at all.

Raborn likewise did not address the issue of the timing of prohibited payments. That case involved persons who concededly were government employees (575 F.2d at 689), and the Ninth Circuit, in describing the elements of the offense in that context, simply observed that Section 209 "prohibits * * * an officer or employee of the executive branch" from receiving any supplementation of salary. 575 F.2d at 691-692. The court in no way suggested that a lump-sum payment designed to supplement an individual's federal salary, but paid immediately before he assumed his position, would be permissible under Section 209.

Petitioners suggest (Individuals' Pet. 12, 15-17), however, that the decision below is novel and warrants review because it will adversely affect the government's ability to attract individuals for top government positions. Petitioners ignore the fact that the court of appeals' holding in this case is fully consistent with the position taken by the Office of Legal Counsel over the past fifteen years in opinions rendered for various agencies and prospective appointees. See opinions cited at pages 11-12, *supra*. Those opinions make clear that severance payments such as those at issue here are clearly barred by Section 209. See also Perkins, 76 Harv. L. Rev. at 1139 n. 89. Petitioners rely (Individuals' Pet. 15) on the testimony of the former Secretary of the Navy that recruitment is made difficult by the financial disincentives involved in the acceptance of high-level government positions. Whatever the accuracy of that view as a general matter, private employers and their employees who wish to enter government service are not free to respond to that supposed problem by making payments that violate a criminal conflict-of-interest statute. Moreover, the interpretation of 18 U.S.C. 209 is the responsibility of the Attorney General, not officials of other departments and agencies.

3. Contrary to petitioner Boeing's contention (Boeing Pet. 15-17), the court of appeals correctly ruled that the amount of the illegal payments is the appropriate measure of monetary relief in this case. In a civil conflict-of-interest case, it may often be difficult to prove loss or damages in the usual sense. Significant aspects of the harm resulting from acceptance of improper payments—the injury to the reputation of public officials in the public's estimation and injury to the morale of other public employees—are unquantifiable, but nonetheless real. In such cases, therefore, this Court has not required a showing of actual loss or damage. *United States* v. *Carter*, 217 U.S.

286, 305 (1910). Instead, the value of the illegal payment is uniformly considered to be the appropriate measure of recovery. *United States* v. *Pezzello,* 474 F. Supp. 462, 463 (N.D. Tex. 1979); *Continental Management, Inc.* v. *United States,* 208 Ct. Cl. 501, 527 F.2d 613, 619 (1975). Compare *Snepp* v. *United States,* 444 U.S. 507, 514 (1980) (while damages accruing by virtue of breach of public trust are unquantifiable, nominal damages will "deter no one" and the most appropriate measure of recovery is profits accruing to the defendants by virtue of the breach). Such a sanction is appropriate because it promotes the congressional goals of "enforcing the loyalty of [the government's] agents" and of deterring future breaches of the standards established by the conflict-of-interest laws. *United States* v. *Kearns,* 595 F.2d 729, 734 (D.C. Cir. 1978).

This rule is especially appropriate under 18 U.S.C. 209, in which Congress prohibited payments designed to supplement the recipient's federal salary, without regard to whether any actual injury is shown, and did so precisely in order to prevent even an appearance of a conflict-of-interest, a subtle form of bribery (see *Muschany* v. *United States,* 324 U.S. 49, 68 (1945)), and the possibility that the recipient might be insufficiently attentive to his federal duties. See *Conflict of Interest and Federal Service* at 211-212. Moreover, the only thing that is required of the individual petitioners in this case is to disgorge the payments that Congress proscribed, plus interest. Petitioners should not be permitted to retain those illegal windfalls on the theory that no quantifiable harm was demonstrated. Nor is there any requirement that the government establish actual corruption, such as preferential treatment of Boeing in return for the payments—although documents indicate that Boeing did anticipate some type of benefit from the placement of its employees in the government

positions.[11] In any event, there is no conflict among the circuits on the issue of damages in a case such as this, and further review therefore is unwarranted.

4. The court of appeals also correctly rejected the individuals petitioners' contention (Individuals' Pet. 17-21), based on common law principles, that they should not be required to disgorge the illegal payments because they "disclosed" the payments received. This contention is without merit for two reasons. First, as the court of appeals held (Pet. App. 9a), the common law rule is inapplicable here, because this suit is based on a statute that bars

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[11] A Boeing document accompanying the recommendation that petitioner Kitson receive a payment notes that his "job with the DOD is viewed as bigger than Crandon's—[and] has greater influence relative to BAC [Boeing Aerospace Company]" (C.A. App. 58). The President of Boeing Aerospace recommended a payment to petitioner Reynolds based on the fact that he "will hold a *key* job" (C.A. App. 50 (emphasis in original)). The President recommended a payment to petitioner Jones based on his view that "having someone with [Jones'] views will be helpful to us *while* he is in Washington, D.C." (C.A. App. 18 (emphasis in original)), and he stated that he would support a payment to petitioner Crandon if there was any finding that Crandon's "assignment would benefit BAC [Boeing Aerospace Company]" (Gov. Exh. 114, No. 002750/100405). Finally, Boeing documents reveal some internal doubt about whether petitioner Paisley's government appointment would be approved, and a Boeing Senior Vice President therefore recommended a payment to Paisley only "if Paisley ends up as a govt official or as consultant" (C.A. App. 40).

Contrary to Boeing's contention (Boeing Pet. 7), the government did not "stipulate" that "no actual conflict of interest occurred." Although petitioners sought to have the government stipulate that it would not contest the "fact" that the individual petitioners did not provide any preferential treatment to Boeing in return for the payments, the government refused to do so. Nevertheless, this "fact" was included in a document, not signed by the government, that was entitled "Joint Stipulations of Uncontested Facts," filed by petitioners with the district court, and included in the joint appendix on appeal (C.A. App. 330-345).

all payments made for the purpose of supplementing the salary of a federal employee, without regard to whether those payments are secret or "disclosed."

Second, even where the common law rule applies, improper payments made to an agent are recoverable by an employer if they have been retained by the agent without full disclosure. *United States* v. *Carter,* 217 U.S. at 305. The court of appeals correctly defined a full disclosure as one that is "formal, complete, and directed to the proper parties" (Pet. App. 9a, citing *United States* v. *Kenealy,* 646 F.2d at 705). The alleged "disclosures" by petitioners in this case did not meet those standards. Petitioners did not separately report the severance payments on their financial disclosure forms,[12] and they have not alleged that anyone in the Department of Defense was ever apprised that Boeing's "severance" payments were made solely to those offered federal employment for the purpose of encouraging them to accept high-level government jobs of key importance to Boeing, and that the payments were based pri-

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[12] Four of the five individuals were required to file SF-278 financial disclosure forms, which are reviewed by ethics officers. The court of appeals found that none of those forms separately disclosed the severance payments (Pet. App. 9a). Petitioners argue that because the instructions for the forms did not direct them to list such payments separately from their salary and other income, their duty of full disclosure was satisfied by their aggregating the payments with other income from Boeing. Petitioners also claim that because ethics officers reviewed the completed forms, and certified that the *disclosed* information showed no potential conflict of interest, they were absolved of any liability. See Individuals' Pet. 20-21. The court of appeals correctly rejected these rationalizations. The fact that the individual petitioners complied with instructions for reporting total income on the financial disclosure forms does not mean that they brought the nature of the severance payments to the attention of appropriate government officials in a way that would enable the latter to pass on their legality.

marily on the difference between the recipient's Boeing and federal salaries.

Moreover, even if the individual petitioners' supervisors had been made fully aware of the circumstances surrounding the payments and had approved them, that action would not absolve the petitioners of liability. Section 209, unlike some other conflict-of-interest statutes, does not authorize any government official to waive its prohibitions. Compare 18 U.S.C. 208(b). As this Court stated in *Mississippi Valley Generating*, knowledge (or even approval) by a superior of a government employee's violation does not establish a waiver of a statutory standard of conduct. This is so because

> an agent's superiors may not appreciate the nature of the agent's conflict, or * * * might, in fact, share the agent's conflict of interest. The prohibition [against such waivers] was therefore designed to protect the United States, as a Government, from the mistakes, as well as the connivance, of its own officers and agents. It is not surprising therefore that [the Court has] consistently held that no government agent can properly claim exemption from a conflict-of-interest statute simply because his superiors did not discern the conflict.

364 U.S. at 561. The court of appeals' conclusion that the common law "disclosure" defense was not established here also is consistent with other appellate decisions. See, *e.g.*, *United States* v. *Kenealy, supra; United States* v. *Medico Indus., Inc.*, 784 F.2d 840, 845 (7th Cir. 1986) ("generals are not authorized to waive the application" of conflict of interest laws). This fact-bound issue does not warrant further review.

5. Finally, petitioners argue (Individuals' Pet. 22-26; Boeing Pet. 12-15) that the court of appeals misapplied the

"clearly erroneous" standard under Fed. R. Civ. P. 52(a) in reversing the district court's finding that petitioners did not intend to violate the prohibition in Section 209(a) against supplementing the recipients' salaries "as compensation for" their federal services. To the contrary, the court of appeals faithfully followed this Court's precedents, examining the entire record and concluding that the district court's factual findings were unsupported, and indeed were contradicted, by undisputed evidence in the record—including the fact that the payments were made solely to Boeing employees who were planning to accept high-level government positions, were made for the purpose of encouraging the recipients to accept such positions, and were calculated to make up the salary differential (Pet. App. 8a). This evidence conclusively establishes that the recipients' prospective federal services were the consideration for the payments, and that the payments therefore were intended "as compensation for" their federal services within the meaning of Section 209(a). See Op. Off. Legal Counsel at 4-7 (May 10, 1976).

The district court's findings, on the other hand, were based in part on a misunderstanding of the statute, since the court apparently believed that it was insufficient for the government to establish that the payments were made solely because of (and were calculated on the basis of the salary for) the recipient's government services. As a result, the district court's findings either were legally irrelevant or affirmatively demonstrated the requisite intent under the statute. See, *e.g.*, Pet. App. 17a (finding that Boeing made payments "to encourage its employees to serve their government"); *id.* at 18a (severance payments were calculated on basis of differential in financial benefits); *id.* at 26a (method of calculating payments irrelevant).

In any event, petitioners' objections to the court of appeals' review of the evidence are without merit. For ex-

ample, petitioner Boeing contends (Boeing Pet. 14) that the court of appeals "selectively disregarded other factual circumstances that specifically negate the inferences that it drew from" the method of calculation and the limitation of eligibility to those entering federal employment. Boeing relies on the district court's finding that " '[t]he severance payments made to the individual defendants were not contingent upon the individuals entering into federal government,' " and that the payments were given " 'unconditionally, no matter what [the employee] did in the future' " (Boeing Pet. 14, quoting Pet. App. 19a; see also Individuals' Pet. 5). The objective evidence of record contradicted these findings. The President of Boeing Aerospace testified that there had never been an occasion when a departing employee accepted a payment and then failed to take the government position, and he stated that he did not know what the Company would do under such circumstances (C.A. App. 635). Moreover, Boeing documents showed that it sought to make sure that the offers of federal employment would be accepted before the payment checks were issued. One document from the Executive Vice President of Boeing Aerospace states that the payment to Jones is "conditional on" Jones' "acceptance of the job" (Gov. Exh. 110, No. 570/100056). Similarly, an internal Boeing document states that company officials were concerned that Paisley's appointment would not be confirmed by the Senate and suggested that a "memo of understanding" be executed to cover a situation in which Paisley would take the payment and then simply retire (Gov. Exh. 111, No. 699-100167).[13]

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[13] Petitioners also point to the testimony that the payments were designed to "avoid a conflict of interest" by "sever[ing] all * * * financial ties" with the Company (Boeing Pet. 5). The payments were not, however, necessary to sever any ties with Boeing. The individual petitioners received the value of vested and accrued benefits in separate

Petitioners also point to their own self-serving statements that they did not think that they were making or receiving payments that amounted to supplementations of salary as compensation for services to the government (Boeing Pet. 13-14; Individuals' Pet. 23-25). Viewing the record as a whole, however, the court of appeals found the record overwhelmingly inconsistent with those statements. This is not a case where a witness "has told a coherent and facially plausible story that is not contradicted by extrinsic evidence." *Anderson* v. *Bessemer City*, 470 U.S. 564, 575 (1985). Rather, as this Court has stated (*ibid.*):

> Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination.

Moreover, this Court has repeatedly held in civil cases that self-serving declarations by a party as to his intent, unsupported by any extrinsic evidence and contradicted by objective facts, may be found to be insufficient as a matter of law to justify a verdict on behalf of that party. See, *e.g.*, *United States* v. *Generes*, 405 U.S. 93, 106-107 (1972); *United States* v. *Union Pac. R.R.*, 226 U.S. 61, 92-93 (1912); *District of Columbia* v. *Murphy*, 314 U.S. 441, 449, 456 (1941). Here, the court of appeals reasonably concluded that petitioners' statements were legally insufficient and should not have been accepted as conclusive

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checks that were not challenged in this case. By contrast, the individual petitioners had no pre-existing entitlement to the payments at issue here, and it therefore was not necessary for Boeing to make them, or for the individual petitioners to receive them, in order to sever ties with Boeing.

by the district court, in the face of the objective evidence in the record.[14]

Petitioners appear to believe that any determination by a court of appeals that a district court's factual findings are "clearly erroneous" necessarily "constitutes a reweighing of evidence contrary to the requirements of Rule 52(a)" (Boeing Pet. 13). Rule 52(a), however, does not insulate factual findings from all review. On the entire record that existed in this case, the court could not help but conclude that "a mistake had been committed." *Anderson* v. *Bessemer City*, 470 U.S. at 575. In any event, the court of appeals' application of the clearly erroneous standard in the particular circumstances of this case does not warrant further review, especially since the district court's findings were infected by errors of law.

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[14] Petitioners assert (Individuals' Pet. 23) that the court of appeals did not address the trial court's finding that they had no compensatory intent in receiving the payments (Pet. App. 8a). In fact, however, the court of appeals did separately address the issue of the individuals' intent. The court specifically stated that the individual petitioners had "calculated salary, benefits and cost-of-living differences over the expected term of government employment" and submitted those calculations to Boeing (*ibid.*), thereby showing that they understood that the payments were to be made because of their federal service and on the basis of their federal salaries. The court of appeals also noted that the employees had received a separate payment for their vested benefits (*id.* at 4a), thereby refuting the individual petitioners' contention that they believed that the challenged payments were intended to compensate them for vested benefits.

CONCLUSION

The petitions for a writ of certiorari should be denied.
Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General
JOHN R. BOLTON
Assistant Attorney General
MICHAEL F. HERTZ
DOUGLAS LETTER
JOAN E. HARTMAN
Attorneys

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